

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 10-0312
Sales and Use Tax
For Tax Years 2007-08**

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ISSUES

I. Sales and Use Tax—Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-8-8; IC § 6-8.1-4-2; IC § 6-8.1-5-1; 45 IAC 2.2-8-12.

Taxpayer protests the imposition of sales or use tax on several items.

II. Tax Administration—Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a truck stop in Indiana with retail operations including fuel sales. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not paid sales tax on several items it used in its business and had not collected sales tax on several taxable sales in its capacity as a retail merchant. The Department therefore issued proposed assessments for sales tax, use tax, interest, and ten percent negligence penalties for the tax years 2007 and 2008. Taxpayer protests some of the items upon which sales or use tax was imposed. An administrative hearing was conducted and this Letter of Findings results. Further facts will be supplied as required.

I. Sales and Use Tax—Imposition.

Taxpayer protests the imposition of sales tax on several items which the Department included in its calculations of taxable sales for the tax years 2007-08. Taxpayer states that many of its fuel sales were to exempt entities and that the Department overstated the price of diesel fuel on several occasions, thereby overstating the amount upon which sales tax should have been imposed. Also, Taxpayer protests that the Department included tire sales for which Taxpayer

states that it only received delivery fees from the tire manufacturer, rather than the entire prices of the tires. Taxpayer also refers to several individual audit report entries which it believes are erroneous. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC§ 6-8.1-5-1(c).

Due to the large number of fuel sales, vehicle repair parts, and other supplies transactions, the Department used a sample and projection method to reach a percentage of compliance accuracy which it then applied to fuel sales for the entire audit period. The use of a sample and projection method is provided by IC § 6-8.1-4-2. Taxpayer agreed to the use of such a projection method, but protests that some of the sales listed as taxable in the sample were to exempt entities and that the percentage of tax which it should have collected should be lowered.

The first relevant statute is IC § 6-2.5-2-1, which states:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. *The retail merchant shall collect the tax as agent for the state. (Emphasis added).*

Next, IC § 6-2.5-8-8 states:

(a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. *A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.*

(b) The following are the only persons authorized to issue exemption certificates:

(1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter;

(2) organizations which are exempt from the state gross retail tax under IC 6-2.5-5-21, IC 6-2.5-5-25, or IC 6-2.5-5-26 and which are registered with the department under this chapter; and

(3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.

(c) The department may also allow a person to issue a blanket exemption certificate to cover exempt purchases over a stated period of time. The department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt. *(Emphasis added).*

Also, regulation 45 IAC 2.2-8-12 provides:

(a) Exemption certificates may be issued [sic.] only by purchasers authorized to issue such certificates by the Department of Revenue. Retail merchants, manufacturers, wholesalers and others who must register with the Department of Revenue and who qualify to purchase exempt from tax under this Act [IC 6-2.5] may issue exemption certificates with respect to exempt transactions. All persons or entities not required to register with the Department as retail merchants, manufacturers, or wholesalers, and who are exempt under this Act [IC 6-2.5] with respect to all or a portion of their purchases are authorized to issue exemption certificates with respect to exempt transaction provided an exemption number has been assigned by the Department of Revenue, or provided that the Department of Revenue has specifically provided a form and manner for issuing exemption certificates without the need for assigning an exemption number.

(b) Retail merchants are required to collect the sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used by the purchaser for an exempt purpose.

(c) *All retail sales of tangible personal property for delivery in the state of Indiana shall be presumed to be subject to sales or use tax until the contrary is established. The burden of proof is on the buyer and also on the seller unless the seller receives an exemption certificate.*

(d) *Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof. The mere filing of a Registered Retail Merchant Certificate number is not sufficient to relieve the seller of the responsibility to collect the sales tax or prove exempt use by the buyer.*

(e) No exemption certificates are required for sales in interstate commerce, however, proper records must be maintained to substantiate such sales.

(f) *An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.*

(g) An exemption certificate or other evidence supporting an exempt sale must be maintained by the seller for at least three (3) years after the due date of the tax return upon which such exempt transaction is reported.

(h) Exemption certificates may be reproduced provided no change is made in the wording or content.

(Emphasis added).

Therefore, as provided by IC § 6-2.5-8-8(a), a seller accepting a valid exemption certificate has no duty to collect or remit the state gross retail or use tax on a purchase. However, as provided by 45 IAC 2.2-8-12(f), an exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such a form is completed.

In this case, Taxpayer was not able to provide exemption certificates for certain sales. Primarily, these sales were to companies which Taxpayer's billing service told Taxpayer were exempt. Taxpayer relied on this information and did not collect sales tax on those sales. In the course of the audit and the protest process, Taxpayer was given time to obtain exemption certificates in order to verify the exempt status of those sales. Taxpayer explained that, despite its repeated requests, neither its billing service nor the purchasers would provide exemption certificates to Taxpayer. Taxpayer explains that it is therefore caught between the requirement of its billing service to treat those sales as exempt and the Department's requirement for verification of exempt sales.

While the Department recognizes that Taxpayer may be unable to obtain exemption certificates from its clients or billing service, the requirements of 45 IAC 2.2-8-12 establish that it is the retail merchant's responsibility to have such documentation prior to treating a sale as exempt. The Department allowed time for Taxpayer to obtain those documents, but Taxpayer was unable to do so. Taxpayer has not met the burden of proving the proposed assessments wrong for these sales.

Next, Taxpayer states that the Department overstated the amount subject to sales tax regarding tire sales. Taxpayer states that its arrangements with the tire suppliers included "delivery fees" which were paid directly from the suppliers to Taxpayer and were not sales amounts. Taxpayer provided documentation supporting this position. After review, Taxpayer did have arrangements with the tire suppliers regarding Taxpayer's fees for selling the tires.

However, the Department's audit listed the amounts Taxpayer's customers paid for the tires as subject to sales tax. It does not matter how that amount was determined. The only relevant factor is how much the final consumer paid for the tangible personal property. In this case, the Department included only the amount which the final consumers paid for the tires. Taxpayer has not met its burden of proving the proposed assessments wrong for these sales.

Next, Taxpayer states that the Department used incorrect diesel prices when calculating the amount of sales tax due. In support of this position, Taxpayer provided handwritten records of the daily price it charged for diesel fuel. After review, this documentation is not sufficient to prove the Department's calculations incorrect.

Next, Taxpayer states that its parent company and its billing service, along with several third-party billing services, have discount diesel fuel arrangements for certain customers. Taxpayer states that it is required to accept these discounts and only charged the discounted rates to those customers. The result is a lower price for certain diesel sales and, therefore, less sales tax on those sales.

As part of the protest process, Taxpayer provided records of such discounts for the tax year 2010. Taxpayer was unable to provide such documentation for 2007 and 2008, which are the tax years at issue in this protest, but points out that the effective date for the discounts listed on the documentation is often for 2007 or earlier. The Department does not agree that these records establish that the discount rates were actually charged during 2007-08. Taxpayer has not met the burden of proving the Department's calculations incorrect.

In conclusion, Taxpayer has not met its burden of proving the Department's proposed assessments wrong. The documentation which Taxpayer was able to supply was not convincing for a variety of reasons. While the Department understands that Taxpayer may be subject to the policies of other entities, particularly in regards to exempt sales and exemption certificates, the Department also reminds Taxpayer that it is the retail merchant and is responsible for maintaining such documentation.

FINDING

Taxpayer's protest is denied.

II. Tax Administration—Negligence Penalty.

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty for the tax years in question. Taxpayer protests the imposition of penalty. The Department refers to IC § 6-8.1-10-2.1(a), which states in relevant part:

If a person:

...

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

...

the person is subject to a penalty.

The Department refers to 45 IAC 15-11-2(b), which states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

45 IAC 15-11-2(c) provides in pertinent part:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and

prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

In this case, Taxpayer incurred a deficiency which the Department determined was due to negligence under 45 IAC 15-11-2(b), and so was subject to a penalty under IC § 6-8.1-10-2.1(a). Taxpayer has not affirmatively established that its failure to pay the deficiency was due to reasonable cause and not due to negligence, as required by 45 IAC 15-11-2(c).

FINDING

Taxpayer's protest is denied.

CONCLUSION

Taxpayer's protest is denied on Issue I regarding sales tax. Taxpayer's protest is denied on Issue II regarding imposition of negligence penalties.

WL/LS/DK November 16, 2010